IN THE

Supreme Court of the United States

October Term, 1970

No. ~~876~~ 70-27

ROBERT MITCHUM, d/b/a THE BOOK MART,
Appellant,

v.

CLINTON E. FOSTER, as Prosecuting Attorney
of Bay County, Florida, M. J. "DOC" DAFFIN,
as Sheriff of Bay County, Florida, and
THE HONORABLE W. L. FITZPATRICK,
as Circuit Judge of the Fourteenth Judicial Circuit
in and for Bay County, Florida,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Pensacola Division

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JURISDICTIONAL STATEMENT

The Appellant appeals from the judgment of the United States District Court for the Northern District of Florida, entered on July 22, 1970, denying Appellant's application for an interlocutory injunction and granting Appellees' motions to vacate and dissolve temporary restraining orders of May 12, 1970, and June 5, 1970, and submits this statement to show

that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented. "R" refers to the certified record previously filed with this Court.

OPINION BELOW

The opinion of the District Court for the Northern District of Florida, Pensacola Division, is not reported. Copies of the opinion-order delivered upon the rendering of the judgment sought to be reviewed and earlier opinions in the same case are attached hereto as Appendix "A".

JURISDICTION

This suit was brought under the authority of the Civil Rights Act (42 U.S.C. § 1983), the Three Judge-Injunctive Relief Statutes (28 U.S.C. §§ 2281, 2284), and the Declaratory Judgments Act (28 U.S.C. § 2201). Additional Jurisdictional grounds relied upon included 28 U.S.C. § 1331, 28 U.S.C. § 1343, and Rules 57 and 65, Federal Rules of Civil Procedure.

This was a civil action seeking injunctive relief from prosecutorial harassment by the Prosecuting Attorney and the Sheriff of Bay County, Florida, and a declaration that § 847.011 and § 823.05, Florida Statutes, (the obscenity and nuisance statutes respectively) are unconstitutional. Temporary restraining orders were issued against prosecutorial officials (R. 99), and subsequently against judicial officials (R. 141).

The judgment of the three judge district court was entered on July 22, 1970, (R. 331-338), and notice of appeal was filed in that court on August 21, 1970, (R. 561).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253, there having been an order denying an interlocutory injunction in a civil action required by Congress to be heard and determined by a district court of three judges.

QUESTION PRESENTED

Where prosecutorial and judicial officials shut down a business or seize its contents on the basis of a finding of obscenity of a relatively small number of magazines contained therein, which finding of obscenity is buttressed by an arbitrary declaration and finding of nuisance, and where there had been no judicially superintended adversary hearing determining that the specific materials seized or contained within the premises are in fact obscene, and where the obscenity statute had been declared unconstitutional by another three judge court in the same State of Florida, does the Federal Anti-Injunction Statute (28 U.S.C. § 2283) prevent federal injunctive relief against state executive and judicial action where such action is in violation of the provisions of the Civil Rights Act (42 U.S.C. § 1983)?

STATUTES INVOLVED

Section 847.011 and Section 823.05, Florida Statutes, are set forth in Appendix "B" hereto.

STATEMENT

Robert Mitchum, hereinafter called Mitchum, is the owner of the sole proprietorship known as The Book Mart in the City of Panama City, Florida. He is engaged in the sale and offering for sale of books, magazines, newspapers, and the showing of films and other matters presumptively protected under the First Amendment to the Constitution of the United States. Mitchum operates his store dispensing adult-type publications in a controlled atmosphere where no sales or offerings are knowingly made to minors under the age of eighteen, where none of the material is pandered, and where no invasion of privacy of any individual has occurred.

Clinton E. Foster, hereafter called Foster, is the Prosecuting Attorney for Bay County, Florida. M. J. "Doc" Daffin, hereinafter called Daffin, is the Sheriff of Bay County, Florida. W. L. Fitzpatrick, hereinafter called Judge Fitzpatrick, is a Circuit Judge in and for Bay County, Florida.

On March 30, 1970, Foster filed in the Circuit Court, a court of original jurisdiction, before Judge Fitzpatrick a complaint seeking the issuance of a temporary injunction against Mitchum from the conducting or the continuing of a business of selling adult-type publications on the grounds that the business constituted a nuisance. A subpoena duces tecum was issued requiring Mitchum to present before the court on April 3, 1970 a copy of every book, magazine, periodical, and pamphlet offered for sale to the public. Numerous publications were presented, but Foster selected 25 publications and introduced them into evidence. A police officer testified that the 25 publications were obscene in his opinion and that many people wanted The Book Mart

extricated from the community. On April 6, 1970, Judge Fitzpatrick found 6 of the 25 publications to be obscene (R. 85-87). Judge Fitzpatrick also found that the conducting of the business constituted a nuisance and he issued an order enjoining and shutting down the business and effectively forbidding dissemination in its entirety. An interlocutory appeal was taken immediately to the First District Court of Appeals, hereinafter called appellate court. Both Judge Fitzpatrick and the appellate court denied supersedeas which would have stayed the order pending appeal. Mitchum unable to obtain relief then on April 30, 1970, filed a complaint in federal court seeking injunctive relief from Judge Fitzpatrick's order (R. 5-92). Winston E. Arnow, District Judge, hereinafter called Judge Arnow, issued a temporary restraining order on May 12, 1970, restraining Foster and Daffin from enforcing Judge Fitzpatrick's order except to the extent that the order prevented the sale on Mitchum's premises of any material determined to be obscene in a prior adversary judicial hearing, held pursuant to due notice (R. 99). Mitchum relying on the District Court order reopened and physically removed all copies of the 6 publications previously determined by Judge Fitzpatrick to be obscene, this precluded any further sale of those materials.

On May 29, 1970, Judge Fitzpatrick issued an order to show cause why Mitchum and his employees should not be held in contempt of court for reopening the business (although the purportedly obscene material was removed) in violation of Judge Fitzpatrick's April 6, 1970, order (R. 140). Mitchum then amended his complaint seeking to join Judge Fitzpatrick as a party defendant, and to enjoin him from acting contrary to Judge Arnow's May 12, 1970, temporary restraining order. On June 5, 1970, Judge Arnow issued a

second temporary restraining order, restraining Judge Fitzpatrick from proceeding with contempt hearings on the alleged violation of reopening contrary to Judge Fitzpatrick's April 6, 1970, order. Judge Arnow also enjoined Judge Fitzpatrick from issuing any order preventing Mitchum from operating and maintaining his business provided, however, that Judge Fitzpatrick was not restrained from proceeding with scheduled contempt hearings or from enforcing or attempting to enforce any order entered by him to the extent that the hearing or enforcement concerned and dealt with the question of a distribution or sale by Mitchum at the business of publications that had been at, a prior judicial adversary hearing held pursuant to due notice, determined to be obscene (R. 141).

Subsequently on June 19, 1970, Judge Fitzpatrick held another hearing where approximately 228 publications had been subpoenaed and presented to him by Foster. No testimony as to contemporary community standards, redeeming social value, or prurient interest was presented. The 228 publications over the objection of Mitchum's counsel were presented into evidence to base such a finding. Six days later on June 25, 1970, Judge Fitzpatrick issued an order (R. 204) declaring 80 of the 228 publications to be obscene. Judge Fitzpatrick again found that the mere operation of the business was prima facie injurious and damaging to the morals and manners of the people of the State of Florida and constituted a public nuisance. Judge Fitzpatrick ratified, confirmed, and continued by his June 25, 1970, order his previous April 6, 1970, order which enjoined the operation of the entire business.

Judge Fitzpatrick also ordered a seizure of all publications offered for sale by Mitchum on the premises, ordered their impounding and enjoined and restrained Mitchum from selling or offering for sale any publication named in his order or any other publication of the same or similar character. At the time of the entry of Judge Fitzpatrick's order none of the 228 publications were located on the premises except the publications known as "Pinned No. 1", "Cover Girl 13", "Cover Girl 16", "Cover Girl 19", "Cover Girl 20", "Exciting 14", "Exciting 19", and "Gigi", all of which publications were declared by the United States Supreme Court to be not obscene in *Bloss v. Dykema*, 398 U.S. 278, 26 L Ed 2d 230, 90 S. Ct. 1727 (1970). Judge Fitzpatrick even declared "Pinned No. 1" obscene contrary to the United States Supreme Court's opinion in *Bloss v. Dykema*, supra, which opinion was handed to Judge Fitzpatrick for his review prior to his making a determination of obscenity. Judge Fitzpatrick declined to follow the holding of the Supreme Court of the United States.

Subsequently on the same day, June 25, 1970, Daffin seized every magazine, book, newspaper, film or other article for sale located on the premises, including numerous copies of the publications enumerated above (R. 211-264). Mitchum filed a motion for leave to file a supplemental complaint for relief from Judge Fitzpatrick's June 25, 1970, order which motion was granted by Judge Arnow on July 8, 1970 (R. 294). Judge Arnow also scheduled a hearing on July 16, 1970, before the three judge court panel, to hear arguments on the request for further relief sought by Mitchum and the dissolution of previous orders sought by the parties defendant.

On July 22, 1970, the three judge court entered the opinion and order appealed from (R. 331-337). The court also ordered the submission of briefs on questions of dismissal, declaratory relief, constitutionality, abstention, and related and dependent questions. Another three judge court, in *Meyer v. Austin*, No. 69-678-CIV-J, U.S.D.C., MD, Fla., on the same day, the same Circuit, Judge Simpson presiding, found § 847.011, Florida Statutes, (the obscenity statute) unconstitutional (Appendix "C").

Despite the fact that Mitchum had never been properly served and that state jurisdiction was and is still disputed (R. 560) the court dismissed the action in the belief that even declaratory relief was not proper (R. 570).

THE QUESTION IS SUBSTANTIAL

The question presented in this appeal is substantial and requires plenary consideration, with briefs on the merits and oral argument for its resolution. Two statutes are attacked, each of which on its face and as applied is an abridgment of free expression, one of which, the obscenity statute, has already been found unconstitutional. Federal injuctive relief against state court prosecutions of the nature described earlier herein is allowed under the "Expressly Authorized by Act of Congress" authorization contained in the Anti-Injunction Statute (28 U.S.C. § 2283).

On May 5, 1970, Judge Arnow felt the court could enjoin state action to preserve the constitutional right of Mitchum to sell material unless and until specified material had been determined obscene in a prior adversary judicial hearing pursuant to due notice. The court acted under the principles

enunciated in *Dombrowski v. Pfister*, 380 U.S. 479, 14 L Ed 2d 22, 85 S. Ct. 1116 (1965), and numerous lower court decisions, and felt strongly that the state court orders involved preventing the operation of Mitchum's presumptively lawful business, and found that this constituted irreparable harm and injury and denial of constitutionally secured rights. Judge Arnow felt there was a substantial attack on the constitutionality of Florida's obscenity statute (§ 847.011) and Florida's nuisance statute (§ 823.05), which feeling is obviously shared with Judge Simpson, as to obscenity, see Appendix "C".

On June 5, 1970, the court found again that the principles of *Dombrowski*, supra, applied and that there was present irreparable harm requiring the granting of temporary relief. Three days later on June 8, 1970, this Court issued its opinion in *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers, et al.*, 398 U.S. 281, 26 L Ed 2d 234, 90 S. Ct. _____, (1970). The lower court (Three Judge Court) relied heavily on *Atlantic Coast*, supra, which decision did not mention the *Dombrowski Doctrine* or whether 42 U.S.C. § 1983 would come within the "Except as Expressly Authorized by Act of Congress" language. 42 U.S.C. § 1983 must come within this language, however, if it is to be considered an exception to the prohibition of 28 U.S.C. § 2283 thereto. Since 42 U.S.C. § 1983 confers a right to sue at law or equity in federal court to redress a deprivation of federally guaranteed rights under color of law, how can 28 U.S.C. § 2283 bar injunction of state court proceedings by federal courts where the allegation is made that the state court proceedings themselves are depriving the plaintiffs of their federal civil rights? The answer should be that 28 U.S.C. § 2283 does not bar injunctions of state court

proceedings by federal courts where the state court proceedings themselves are depriving plaintiffs of their federal civil rights statutorily prescribed.

In enacting 42 U.S.C. § 1983, Congress has created a specific and uniquely federal remedy available to private citizens and opened the doors of the federal courts to dispense the remedy. This remedy is made meaningless if the federal court cannot enjoin certain proceedings in state courts which if not stayed destroys the remedy created by Congress.

In *Amalgamated Clothing v. Richman Brothers*, 348 U.S. 511 (1955), this court held that a statute could "expressly" authorize an exception to the Anti-Injunction Act even though the statute did not by its terms refer to the act (348 U.S. at 516). The Civil Rights Act (42 U.S.C. § 1983) provides for a "suit in equity", and, after all, what is a suit in equity but a request for an injunction? See also: *Dilworth v. Riner*, 343 F.2d 226 (5th Cir., 1965); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220.

An examination of the purpose sought to be achieved by the enactment of 42 U.S.C. § 1983 leads to the conclusion that it must be read as an exception to 28 U.S.C. § 2283. 42 U.S.C. § 1983 is derived almost intact from § 1 of the 1871 "Act to Enforce the Fourteenth Amendment." The Reconstruction Congresses were concerned not only with protecting the civil rights of the newly enfranchised citizenry but also with insuring that the Federal Government be given the principal responsibility for this protection. The Congresses had also passed the Thirteenth, Fourteenth, and Fifteenth Amendments, which the court said in *Strauder v. West Virginia*, 100 U.S. 303, 306-307, had a common purpose,

namely to secure rights to the recently emancipated slaves. See *Ex Parte Virginia*, 100 U.S. 339.

The legislative history of 42 U.S.C. § 1983 indicates that it was enacted to protect the rights of those newly freed and to grant them access to federal courts for the protection of those rights. See Note, *The Dombrowski Remedy – Federal Injunctions Against State Court Proceedings Violation of Constitutional Rights*, 21 Rutgers L. Rev. 92, 109-113; *Monroe v. Pape*, 365 U.S. 167, 180; *Landry v. Daley*, 288 F. Supp. 200, (N.D. Ill. 1968). If 42 U.S.C. § 1983 is not regarded as an exception to 28 U.S.C. § 2283, the statutory scheme for the protection of constitutional rights would be rendered nugatory whenever state action falling within the ban of 42 U.S.C. § 1983 took the form of a legal proceeding. A claimant alleging applicability of "the Dombrowski Doctrine" usually will not be able to present a "case or controversy" unless prosecution is threatened, and in the great bulk of the cases the threat of prosecution will not manifest itself until charges have been filed. Thus as a practical matter the Dombrowski doctrine is essentially valueless unless it may be applied to pending prosecutions in state courts. It is submitted that Judge Wisdom of the 5th Circuit was correct when he found in his concurring opinion in *Ware v. Nichols*, 266 F. Supp. 564 (N.D. Miss. 1967) that 42 U.S.C. § 1983 was an express exception to the Anti-Injunction Act because 42 U.S.C. § 1983 represented federal interposition under the Supremacy Clause to protect individuals from state denial of their constitutionally protected rights (266 F. Supp. at 570).

Dombrowski, supra, merely extends a long standing principle of law dating back to *Ex Parte Young*, 209 U.S. 123 (1908), and including *Monroe v. Pape*, supra, *McNeese v.*

Board of Education, 373 U.S. 668, 10 L Ed 2d 622, 83 S. Ct. 1433 (1963); *Baggett v. Bullitt*, 377 U.S. 360, 12 L Ed 2d 377, 84 S. Ct. 1316 (1964). This is the principle of affording an extra measure of protection to the vital and sensitive freedom of expression guaranteed by the First Amendment. In essence *Dombrowski*, supra, and its progeny dictate that federal courts must not abstain, but must grant declaratory and injunctive relief against state prosecution under a statute that has an impermissible chilling effect upon the freedom of expression guaranteed by the First Amendment.

In this case the three judge court should be required to proceed to judgment since both § 847.011 and § 823.05 are attacked as overbroad, § 847.011 is unconstitutional and Mitchum has demonstrated that the existence of the two statutes and the state's application thereof actually deprive him of operating a book store. *Dombrowski*, supra, and the two Zwickler cases support this proposition (*Zwickler v. Koota*, 389 U.S. 241, 19 L Ed 2d 444, 88 S. Ct. 391 (1967); *Golden v. Zwickler*, 394 U.S. 103, 22 L Ed 2d 113, 89 S. Ct. 956 (1969).

If the statute is unconstitutionally overbroad as alleged, then injunctive relief is warranted because there is a continuous and recurring threat and fact of prosecution resulting in a chilling effect upon the exercise of freedom of expression. Even if the statute is unconstitutionally vague then *Cameron v. Johnson*, 390 U.S. 611, 20 L Ed 2d 182, 88 S. Ct. 1335 (1968), coupled with *Baggett v. Bullitt*, supra, indicates injunctive relief would lie against enforcement of the statute regulating expression and found to have the requisite chilling effect.

In this case there is bad faith which is a plan to harass Mitchum to deter him from exercising his First Amendment freedom to sell books. Before Mitchum filed this suit at least 4 arrests of employees and 2 massive seizures of material have been set aside. Since dismissal 4 arrests resulted in a sentence of 5 years imprisonment or $5,000.00 for an employee's sale of a total of 10 magazines on 3 separate occasions. Another was sentenced to 1-1/2 years or $1,500.00 for the single sale of 3 magazines. For the latest arrests $1,000.00 cash bond per magazine is required to be posted. To refuse to grant interlocutory injunctive relief under these conditions is an abuse of discretion. More than 30 lower federal court decisions involving the question whether the Anti-Injunction Act is a bar to injunctive relief under pending state proceedings have been reported since *Dombrowski*, supra. More than 1/4 of these cases presented this question to this court. The question hasn't been answered and this case seeks a decision that 42 U.S.C. § 1983 is an exception to 28 U.S.C. § 2283.

CONCLUSION

The questions presented are substantial and are entitled to plenary consideration. For all of these reasons, we believe that probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX A.

Notice of Appeal to the Supreme Court of the United States

Filed August 21, 1970

Notice is hereby given that Robert Mitchum, d/b/a The Book Mart, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order denying plaintiff's application for preliminary injunction and the dissolution of temporary restraining orders previously having been granted therein, said order of denial and dissolution having been entered in this action on July 22, 1970.

This appeal is taken pursuant to 28 U.S.C. §1253.

/S/ PAUL SHIMEK, JR.
Attorney for Plaintiff
517 North Baylen Street
Pensacola, Florida

Proof of Service

I hereby certify that copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been furnished to Joe J. Harrell, Esquire, Attorney for Defendant, Clinton E. Foster, 201 East Government Street, Pensacola, Florida; the Honorable Raymond L. Marky, Assistant Attorney General, Attorney for Clinton E. Foster and the

State of Florida, The Capitol, Tallahassee, Florida; the Honorable Michael J. Minerva, Assistant Attorney General, Attorney for the Honorable W. L. Fitzpatrick, The Capitol, Tallahassee, Florida; and Mayo C. Johnston, Esquire, Attorney for M. J. "Doc" Daffin, 406 Magnolia Avenue, Panama City, Florida, by mail this 21st day of August, 1970.

/S/ PAUL SHIMEK, JR.

Temporary Restraining Order

Filed May 12, 1970

This cause came on to be heard on Plaintiff's application for temporary restraining order. Defendants filed motion to dismiss complaint which, after hearing, the Court denied.

Plaintiff seeks order restraining the Defendants from interfering with the operation of Plaintiff's business in Panama City, Florida, and from enforcing any orders preventing the conduct of such business without there being first held a prior judicially superintended adversary hearing declaring specific publications obscene before the enjoining of their sale.

On the undisputed facts before the Court, on March 30, 1970, Clinton E. Foster, Prosecuting Attorney for Bay County, Florida, filed in the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, hereinafter called Circuit Court, a complaint wherein he requested that Circuit Court to issue a temporary injunction without bond against the Plaintiff for the conducting or continuing of a

nuisance and from removing or in any way interfering with or mutilating the furniture, fixtures, and movable property including inventory used in the conduct of the business located at 19 Harrison Avenue, known as The Book Mart, Panama City, Florida. On April 3, 1970, pursuant to three days notice, a hearing was held wherein 25 publications were entered into evidence as exhibits before the Circuit Court. Six of the 25 exhibits presented were declared to be obscene by the Circuit Court. No determination as to the obscenity vel non of the other 19 Constitutionally presumptively protected publications was made. The order reciting the determination of obscenity of six publications was rendered on April 6, 1970, and in addition to the finding of obscenity of the six publications the Circuit Court found that the activities of the Plaintiff at 19 Harrison Avenue, Panama City, Florida, were prima facie, injurious and damaging to the morals and manners of the people of the State of Florida and were prima facie subversive to public order and decency and prima facie constituted a public nuisance. The Circuit Court issued a temporary injunction against Robert Mitchum, his agents, employees, grantees, assigns and successors from operating and maintaining any business on the premises known as 19 Harrison Avenue, Panama City, Florida, and enjoined Robert Mitchum and his agents, employees, servants, grantees, assigns and successors from removing any property or thing from or off the premises of 19 Harrison Avenue, Panama City, Florida, until further order of that court.

Plaintiff's motion for supersedeas pending determination of interlocutory appeal was denied by the trial court and also by the First District Court of Appeal of Florida.

Before this Court, it is established by uncontroverted sworn complaint that Plaintiff sells; at this location, other

materials besides those held obscene; at least on the record before this Court, that evidence was not presented in any of the state court proceedings held thus far. The state's action is brought and the state court's order entered in the suit seeking, under the Florida Statutes, abatement as a nuisance. Florida Statute 60.05 provides "injunction shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance". The constitutional right of Plaintiff to sell material unless and until it has been determined obscene in a prior adversary judicial hearing, pursuant to due notice, is now well established. See, among others, *H M H Publishing Co., Inc. v. Oldham,* 306 F. Supp. 495 (M.D. Fla. 1969), and cases therein cited. Under principles enunciated in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), and its progeny, the state court order here involved preventing operation of Plaintiff's presumptively lawful business does present irreparable harm and injury, and it appears to be the kind that, in this early stage in the state court proceedings, requires the action taken by this Court in this order. The attacks on the Florida Statutes involved as being unconstitutional are serious, and not frivolous.

Accordingly, it is

ORDERED:

1. Defendants, their agents, servants, employees and attorneys, and all persons acting under their direction and control, or in active concert or participation with them, are hereby temporarily restrained from enforcing or seeking to enforce that certain order dated April 6, 1970, entered by the Circuit Court of the Fourteenth Judicial Circuit for the State of Florida, in and for Bay County, in the case styled State of

Florida, Plaintiff, v. Robert Mitchum, et al., Defendants, being Case 70-292(B), except to the extent such order prevents the sale, on Plaintiff's premises referred to therein, of any material determined to be obscene in a prior adversary judicial hearing held pursuant to due notice.

2. This order shall become effective upon the filing by Plaintiff of a good and sufficient bond in the penal sum of $1,000.00 approved by the Clerk of this Court, conditioned that Plaintiff shall pay to Defendants the amount of any damage sustained by Defendants should it later be found this order was wrongfully issued. Unless previously revoked by the undersigned, this order shall remain in force only until the hearing and determination by the full court.

DONE AND ORDERED this 12th day of May, 1970.

/S/ WINSTON E. ARNOW
Chief Judge

Temporary Restraining Order

Filed June 5, 1970

This matter is before the Court on motion for leave to amend complaint and to add as party defendant The Honorable W. L. Fitzpatrick, in his capacity as Circuit Judge of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, as well as upon the application of plaintiff for a temporary restraining order against the additional defendant. Notice of hearing has been given.

Argument on the motion for leave to amend complaint and to add a party defendant having been heard, the Court has, by oral order entered on the record in the hearing, granted such motion, so that such person, in such capacity, is added as a party defendant.

The Court has heard argument on the question of temporary restraining order. Presented in this case is a substantial attack on the constitutionality of Florida's obscenity statute, section 847.011, and Florida's nuisance statutes, section 823.05 and 60.05. Both statutes are attacked in two respects; first, that the substantive standard by which the alleged material and activity is to be judged, i.e., whether the books are obscene and whether the maintenance of the business is a public nuisance, is so broad as to sweep within its purview not only properly regulated activities but also constitutionally protected activities; and secondly, that the same standard is so vague as to be meaningless to those whose activities are sought to be measured by that standard. In relation to the attack on the application of a Florida nuisance statute to the control of obscenity, the discussion of

"common law nuisance" in *Grove Press, Inc. v. City of Philadelphia,* 300 F. Supp. 281 (E.D. Pa. 1969) appears to be pertinent.

On the facts before the Court, it is determined the principles of *Dombrowski v. Pfister,* 380 U.S. 479 (1965) and *Sheridan v. Garrison,* 415 F.2d 699 (5 Cir. 1969), as well as principles enunciated in other and subsequent cases, including, among others, the reference to the question of contempt set forth in the case of *Kingsley Books, Inc., v. Brown,* 354 U.S. 436, 443 note 2 (1957), show there is here presented irreparable damage requiring the granting of the temporary order hereafter set forth and of such motion of plaintiff, to that extent.

It is, therefore,

ORDERED:

1. The Defendant, Honorable W. L. Fitzpatrick, as Circuit Judge of the Circuit Court of the Fourteenth Judicial Circuit in and for Bay County, Florida, is hereby restrained from holding or proceeding with the contempt hearing scheduled to be held by him on June 5, 1970, as provided in his order dated May 29, 1970, in Civil Action No. 70-292(B), pending before him, and from calling or holding any other contempt hearing based upon or growing out of any alleged violation of his injunction order of April 6, 1970, entered in the suit previously referred to, or any other order that might now or hereafter be entered by him under which plaintiffs are enjoined, restrained or prevented from operating and maintaining "The Book Mart" business at 19 Harrison Avenue, Panama City, Florida, and from enforcing or

attempting to enforce any such order, provided, however, defendant is not restrained from proceeding with the scheduled contempt hearing, or any other such hearing, or from enforcing or attempting to enforce any such order entered by him to the extent such hearing or enforcement or attempted enforcement is concerned and deals with the question only of the distribution or sale by such plaintiff at such business of any publications that have at a prior judicial adversary hearing held pursuant to due notice been determined to be obscene.

2. There has been entered a prior temporary restraining order in this case under which a bond has been required to be filed by plaintiff, and the Court holds that no bond is required in connection with this order.

3. This order shall remain in force only until the hearing and determination by the full court on application for temporary injunction.

The matter will be set on such application for temporary injunction as promptly as reasonably possible by the Court, after receiving application for such hearing.

DONE AND ORDERED this 5th day of June, 1970, as of 11:30 A.M. CDT.

/S/ WINSTON E. ARNOW
Chief Judge

Opinion – Order

Filed July 22, 1970

Before SIMPSON, Circuit Judge, and SCOTT and ARNOW, District Judges.

BY THE COURT:

Before this statutory three-judge court (28 U.S.C. 2281, 2284) for decision upon argument and submission after due notice are plaintiff's application for preliminary injunction in accord with prior temporary restraining orders issued herein by Judge Arnow as a single judge, and motions of the several defendants to vacate or dissolve said temporary restraining orders.

Also presented are motions of the defendants to strike and to dismiss addressed to the amended or supplemental complaint.

The facts necessary to our determination are briefly stated. Not in dispute, they are drawn from the pleadings and admissions therein and from stipulations entered into by counsel before Judge Arnow on July 8, 1970.

In late March 1970, the defendant Foster, in his official capacity brought suit in the Circuit Court for Bay County, Florida, under that state's general nuisance statutes, Sections 823.05 and 60.05, Florida Statutes, seeking abatement as a nuisance of plaintiff Mitchum's business "The Book Mart", 19 Harrison Avenue, Panama City, Florida. The defendant Fitzpatrick on April 6, 1970, in his official capacity as Judge

of that court, granted interlocutory relief based upon the offering for sale by plaintiff of certain books determined by the state court after examination to be obscene under Section 847.011, Florida Statutes.

Review of that interlocutory order and later contempt proceedings against plaintiff thereunder is presently pending upon plaintiff's appeal before the appropriate Florida appellate court, the Florida District Court of Appeals for the First District.

After the state court had taken jurisdiction and entered its original order this suit was instituted. Judge Arnow as a single judge upon May 12, 1970 and June 5, 1970, entered temporary restraining orders directed to the state prosecuting attorney, the state circuit judge, and the executive officer of the state court, Sheriff Daffin, enjoining further proceedings in and under the state court suit. Without detailing the exact dates of entry of the competing restraining orders of Judge Arnow and the injunctive orders of the state court, it is important to note that the state court suit was brought earlier in time and that the state court had assumed jurisdiction when the instant case was commenced. Judge Arnow's restraining order of May 12 was addressed to the original state court temporary injunction and his further restraining order of June 5 was based upon and addressed to the state court contempt proceedings.

Without discussing or determining the propriety or legality of Judge Arnow's temporary restraining orders as a means of preserving the jurisdiction of this court pending presentation of the questions involved to this three-judge court, we determine that dissolution of said temporary

restraining orders is required by a significant decision rendered by the Supreme Court of the United States after Judge Arnow had acted for this court. The opinion referred to came down June 8, 1970, No. 477-October Term, 1969, *Atlantic Coast Line Railroad Company* Petitioner, *v. Brotherhood of Locomotive Engineers, et al.*, 38 L.W. 4471, _____ U.S. _____ _____ S.Ct. _____ _____ L.Ed. 2d _____ There in construing the anti-injunction statute first adopted by the Congress in 1793 and now carried forward through subsequent amendments as 28 U.S.C., Section 2283[1], the court quoted its pronouncement in *Amalgomated Clothing Workers of America, et al. v. Richman Brothers Co.*, 348 U.S. 511, 75 S.Ct. 452, 99 L.Ed. 600 (1955) as follows: "This is not a statute conveying a braod general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions" and proceeded:

> "Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be

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[1] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

> enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." 38 L.W. 4472, 4473.

The injunctive relief sought here as to the proceedings pending in the Florida courts does not come under any of the exceptions set forth in Section 2283. It is not expressly authorized by Act of Congress; it is not necessary in the aid of this court's jurisdiction and it is not sought in order to protect or effectuate any judgment of this court.

Dealing with the "necessary in aid of its jurisdiction" exception the Supreme Court in *Atlantic Coast Line* said further:

> "First, a federal court does not have inherent power to ignore the limitations of §2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. Cf. *Amalgamated Clothing Workers v. Richman Bros.*, supra, at 519–520. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be '*necessary in aid of*' that jurisdiction. While this language is admittedly broad, we conclude

> that it applies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of §2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." 38 L.W. 4475

In conclusion the court in *Atlantic Coast Line* said:

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion." 38 L.W. 4475.

The clear applicability of *Atlantic Coast Line* to the facts here present makes unnecessary any further discussion by us of the principles involved in the interplay between state and federal jurisdictions. The temporary restraining orders are due to be dissolved, and the application for preliminary injunction must be denied. For like reasons no permanent injunctive relief is warranted. No amount of tortured reasoning by us will suffice to force the factual situation in this case as outlined above into fitting any of the statutory exceptions to the anti-injunction mandates of Title 28, U.S.C., Section 2283. Injunctive relief, either preliminary or permanent, is not available on these facts.

The court at the hearing on this matter in Tallahassee on July 16, 1970, heard argument on the motions to dismiss the

amended or supplemental complaint. The motions to dismiss were hurriedly filed and briefed in order to be considered at the July 16 hearing. Similar haste is not required in ruling upon them but we are constrained to provide a prompt and appealable ruling consonant with our views as to the availability of injunctive relief. This order will accomplish that end.

We do not contemplate requiring further argument (although we do not foreclose it) as to the motions to dismiss, but inasmuch as the complaint seeks declaratory as well as injunctive relief we consider it appropriate, before reaching a decision as to dismissal of the complaint, to call upon counsel for additional briefs in this respect. The briefs should cover the questions raised by the motions to dismiss, the complaint's prayer for declaratory relief, the applicability of the doctrine of abstention by this court during pendency of the state proceedings, and related and dependent questions. We do not foresee the necessity for reply briefs.

In consideration of the foregoing, it is

ORDERED:

1. Plaintiff's application for preliminary injunction is denied, and all further injunctive relief, preliminary or permanent, sought by the amended or supplemental complaint, is likewise denied. In this respect this order is intended to be final for all purposes, including appeal.

2. The defendants' motions to vacate or dissolve the temporary restraining orders herein of May 12, 1970 and June 5, 1970 are each granted and said temporary restraining orders are each vacated and dissolved.

3. The motion to strike from the amended or supplemental complaint reference to the defendant M. J. "Doc" Daffin "individually" is granted. *Sua sponte*, the court strikes any reference to actions of the defendants Foster and Fitzpatrick as individuals. The defendant Daffin's motion to strike paragraph 4 of the complaint is not passed upon since it is rendered moot by dissolution of the temporary restraining orders and by final refusal of any injunctive relief.

4. Ruling upon the motions to dismiss the amended or supplemental complaint interposed by the several defendants is deferred for further consideration by the court. In this connection the respective parties are directed to file and serve contemporaneous briefs on or before August 15, 1970. Four copies shall be filed with the Clerk, one for the court file and one for use of each of the three judges of this court.

Done and Ordered this 22nd day of July, 1970.

/S/ Bryan Simpson
United States Circuit Judge

/S/ Charles R. Scott
United States District Judge

/S/ Winston E. Arnow
United States District Judge

ARNOW, concurring:

Under *Atlantic Coast Line*, and its command, it is appropriate this Court now determine no permanent injunctive relief against the pending state court action is

warranted. But there is not foreclosed by this order the possibility of injunctive relief against future enforcement of either or both of the state statutes here involved by the defendant state officers, in the event this Court does not dismiss, but proceeds to give declaratory relief, with such resulting in holding of unconstitutionality of one or both of these statutes.

Order of Dismissal Without Prejudice

Filed September 15, 1970

Before SIMPSON, Circuit Judge, SCOTT and ARNOW, District Judges.

BY THE COURT:

In our order of July 22, 1970, we concluded that the recent opinion of the Supreme Court of the United States in *Atlantic Coast Line Railroad Company,* Petitioner, *v. Brotherhood of Locomotive Engineers, et al.*, 38 L.W. 4471, 398 U.S. 281, ____ S.Ct. ____, 26 L.Ed.2d 234 (1970) rendered injunctive relief inappropriate in this case. Accordingly, we dissolved the temporary restraining orders which had previously been granted by a single judge of this panel. The matter of a declaratory judgment was reserved until after submission of further briefs.

After considerable study we are likewise of the opinion that declaratory relief is not proper here. Since we may not issue an injunction in this action, it is obvious that we are

without power to give effect to any judgment which we might render adverse to the defendants in this action. Under these circumstances a declaratory judgment would be hollow, and at best an advisory opinion for some future litigation. Given this posture of the case, we think it better that we do not further complicate this troubled and confused area of the law by rendering a declaratory judgment which the court lacks power to enforce. Therefore, it is

ORDERED:

1. Plaintiff's application for a declaratory judgment is denied without consideration of the merits of such application, and this action is dismissed without prejudice.

2. The defendants are awarded judgment for their taxable costs, to be assessed by the Clerk of this Court, for which let execution issue.

DONE and ORDERED this September 15th, 1970.

/S/ Bryan Simpson
United States Circuit Judge

/S/ Charles R. Scott
United States District Judge

/S/ Winston E. Arnow
United States District Judge

APPENDIX B.

FLORIDA STATUTES

Chapter 847
Obscene Literature; Profanity

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.—

(1) (a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any

advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, or both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(b) The knowing possession by any person of six or more identical or similar materials, matters, articles or things coming within the provisions of the foregoing paragraph (a) is presumptive evidence of the violation of said paragraph.

(2) A person who knowingly has in his possession, custody, or control any obscene, lewd, lascivious, filthy, ~~indecent, immoral,~~ sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory

representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise the same, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding six months or by fine not exceeding $500.00, or both. In any prosecution for such possession, it shall not be necessary to allege or prove the absence of such intent.

(3) No person shall as a condition to a sale, allocation, consignment, or delivery for resale of any paper, magazine, book, periodical, or publication require that the purchaser or consignee receive for resale any other article, paper, magazine, book, periodical, or publication reasonably believed by the purchaser or consignee to be obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic, and no person shall deny or threaten to deny or revoke any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure of any person to accept any such article, paper, magazine, book, periodical, or publication, or by reason of the return thereof. Whoever violates this section is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

(4) Every act, thing, or transaction forbidden by this section shall constitute a separate offense and shall be punishable as such.

(5) Proof that a defendant knowingly committed any act or engaged in any conduct referred to in this section may be

made by showing that at the time such act was committed or conduct engaged in he had actual knowledge of the contents or character of the material, matter, article, or thing possessed or otherwise dealt with, or by showing facts and circumstances from which it may fairly be inferred that he had such knowledge, or by showing that he had knowledge of such facts and circumstances as would put a man of ordinary intelligence and caution on inquiry as to such contents or character.

(6) There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section, and upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer the same shall be delivered to and held by the clerk of the court having jurisdiction to try such violation. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. Whenever the relator state attorney, county solicitor or county prosecuting attorney shall request a judge of said court to set a hearing upon an application for such a restraining order, such judge shall set such hearing for a time within three days after the making of such request. No such order shall be made unless such judge shall be satisfied that sufficient notice of the application therefor has been given to the party restrained of the time when and place where the application for such restraining order is to be made, provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

(c) The person sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

(d) In the event that a final decree of injunction is entered, it shall contain a provision directing the defendant having the possession, custody, or control of the materials, matters, articles, or things affected by the injunction to surrender the same to the sheriff and requiring the sheriff to seize and destroy the same. The sheriff shall file a certificate of his compliance.

(e) In any action brought as provided in this section, no bond or undertaking shall be required of the state or the state

attorney or county solicitor or county prosecuting attorney before the issuance of a restraining order provided for by paragraph (b) of this subsection, and there shall be no liability on the part of the state or the state attorney or the county solicitor or the county prosecuting attorney for costs or for damages sustained by reason of such restraining order in any case where a final decree is rendered in favor of the person sought to be enjoined.

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

(8) The several sheriffs, constables, state attorneys, county solicitors, and county prosecuting attorneys shall vigorously enforce this section within their respective jurisdictions.

(9) This section shall not apply to the exhibition ofmotion picture films permitted by former §521.02.

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(11) For the purposes of this section, the word person includes individuals, firms, associations, corporations, and all other groups and combinations.

Chapter 823
Nuisances; Doors of Certain Buildings

Section 823.05 Places declared a nuisance; may be abated and enjoined. – Whoever shall erect, establish, continue, or maintain, own or lease any building, booth, tent or place which tends to annoy the community or injure the health of the community, or become manifestly injurious to the morals or manners of the people as described in §823.01, or shall be frequented by the class of persons mentioned in §856.02, or any house or place of prostitution, assignation, lewdness or place or building where games of chance are engaged in violation of law or any place where any law of the state is violated, shall be deemed guilty of maintaining a nuisance, and the building, erection, place, tent or booth and the furniture, fixtures and contents are declared a nuisance. All such places or persons shall be abated or enjoined as provided in §§60.05 and 60.06.

APPENDIX C.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RUSS MEYER, EVE PRODUCTIONS, INC., JACK VAUGHAN and JACK VAUGHAN PRODUCTIONS, INC.,
Plaintiffs,

No. 69–678–Civ–J

v.

T. EDWARD AUSTIN, as State Attorney for the Fourth Judicial Circuit in and for the State of Florida, and DALE CARSON, as Sheriff of Duval County, Florida,
Defendants.

Judgment

Filed July 22, 1970

For reasons assigned in Judge McRae's opinion for the majority of this Court, filed herein this day, (Judge Young dissenting by separate opinion), it is

ORDERED:

1. Florida Statutes, section 847.011 (1967) is declared to be unconstitutional in its entirety, and defendants, their

employees, agents and attorneys are hereby permanently enjoined from enforcing its civil and criminal provisions.

2. The order to show cause entered herein on February 13, 1970, is discharged.

3. The transcript, with pictures, of "Vixen" is found to be irrelevant for purposes of this case, and it is ordered stricken from the amicus brief and returned to Citizens for Decent Literature, Inc.

4. Remaining issues not considered by this panel are hereby remitted to the requesting judge for such further proceedings as may be necessary.

ENTERED this 22nd day of July 1970.

/S/ Bryan Simpson,
Circuit Judge

/S/ Wm. A. McRae, Jr.,
District Judge

I dissent from the above judgment; separate dissenting opinion to be filed later.

/S/ George C. Young,
District Judge

Opinion

Filed July 22, 1970

Before SIMPSON, Circuit Judge, and McRAE and YOUNG, District Judges.

McRAE, District Judge:

Plaintiffs have brought this action seeking injunctive, declaratory, and other relief, and in particular challenging the constitutionality of the Florida obscenity statute, section 847.011.[1] A three-judge court was convened pursuant to 28 U.S.C. §§ 1331, 1332, 1343, 2201, and 42 U.S.C. § 1983, and it finds that abstention is not appropriate because of the authoritative rulings of the Florida state courts[2] and because of the substantial first amendment claims raised here. *Zwickler v. Koota*, 389 U.S. 241 (1967).

The parties have stipulated to the facts relevant to the seizure of the film "Vixen" at about 3:00 P.M. on October 3, 1969. (See Appendix II). Criminal prosecution of the exhibitor following that seizure was enjoined by this Court in the case of *Mandell v. Carson*, 309 F. Supp. 326 (M.D. Fla., 1969) (temporary restraining order) because no prior adversary hearing had been obtained. A civil proceeding against the exhibitor Mandell and against the film followed in state court seeking, under section 847.011, a temporary

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[1] The statute challenged, Florida Statutes, section 847.011 (1967) is attached as Appendix I.

[2] *See* sections 1–3, *infra*.

restraining order against the further showing of the film until a final determination of the state proceeding, and seeking to have the film declared obscene and to have it confiscated and destroyed. *Florida ex rel. Austin v. Mandell*, No. 69-8106-H (4th Judicial Cir. Ct., Duval Cty., Fla.). A petition for removal of that suit on diversity grounds is presently pending in this Court, No. 69–679–Civ–J (M.D. Fla.). (The state circuit court permitted the intervention of Jack Vaughan, a Georgia citizen, and Jack Vaughan Productions, Inc., a Georgia corporation, and defendant Mandell abandoned the suit).[3] The present suit was filed at the same time as the petition for removal, on October 30, 1969. Subsequently, on November 17, 1969, a temporary restraining order was entered against further acts by defendants to enforce section 847.011 against the film "Vixen" pending consideration by this Court.

Plaintiff Russ Meyer is the director and producer of "Vixen" and principal stockholder and chief executive officer of plaintiff Eve Productions, Inc., owner of the print involved. Jack Vaughan is the sole stockholder and chief executive officer of plaintiff Jack Vaughan Productions, Inc., which distributes the film in Florida, Georgia, Alabama, and Tennessee. Defendant T. Edward Austin is the State Attorney for the Fourth Judicial Circuit of Florida, and defendant Dale Carson is the Sheriff of Duval County, Florida. Following the hearing, Citizens for Decent Literature, Inc., an Ohio

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[3] There is consequently no 28 U.S.C. §2283 problem in this suit, since there is at present no pending state court proceeding, either civil or criminal. Thus, *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir., 1969), *cert. denied*, 396 U.S. 1040 (1970), are not involved in the case *sub judice*.

corporation, was permitted to file an extensive amicus curiae brief on February 13, 1970, and a supplement thereto on March 18, 1970.

Findings of Fact

In addition to the facts stipulated regarding the initial seizure without a prior adversary hearing (Appendix II), and the subsequent history of this case detailed above, it was conclusively proven at the hearing that the statewide distribution and exhibition of the film was severely "chilled" and utlitmately halted as a result of the state's seizure on October 3, 1969, and the subsequent prosecutions.

At the hearing, testimony indicated that by October 3, 1969, approximately 225,000 persons had seen the film in the four-state area served by plaintiff Jack Vaughan Productions, Inc. In Jacksonville, some 23,000 persons of the age of eighteen or over had seen the film at the Five Points Theatre during the five weeks before its confiscation on October 3. Following the injunction of state prosecution, the film was shown to 7,000 additional patrons in six days. The exhibitor stated that the film rated as one of the three or four most financially successful films of the year. At the time of the Jacksonville seizure, three theatres in Miami and one in Gainesville were showing the film.

Although there had been no outright cancellations before October 3 – the date of the seizure – a four-week booking, made final only the day before, at the Florida Theatre in Tampa was cancelled on the afternoon of October 3 because of the Jacksonville seizure. Theatres in Jacksonville (besides the Mandell theatre) and Winter Park cancelled availability

play dates because of the seizure, and theatres in Daytona Beach and Key West cancelled October bookings for the reason that the film had been seized in Jacksonville and because the exhibitors did not wish to find themselves in legal difficulties. A Neptune Beach theatre did not show the film as scheduled; and three theatres in Miami cut short otherwise successful runs, and another cancelled a booking for October 16–22. A Lake City theatre was allegedly threatened with prosecution by the state's attorney and cancelled a November booking. Thus, in the entire state, only theatres in Melbourne and Cocoa Beach risked playing a full run between the seizure and the January hearing. One showing in Gainesville, begun before the hearing, finished without interruption.[4] Subsequent attempts by plaintiffs, before the hearing, to book the film were unsuccessful, except that, at the time of the hearing, a date was scheduled to begin in late February, 1970, at four Wometco theatres in Miami. However, on February 9, Wometco cancelled with the comment "...waiting for the Jax decision." Exhibit 8 shows that as many as 34 play dates in one week were cancelled during the month of October alone. In all, at least eleven different theatres cancelled because of the seizure. The inherent flexibility of theatre booking arrangements makes it difficult to determine exactly how many play dates were lost after the month of October. In light of the apparent commercial success the film enjoyed

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[4] After the hearing, there was one showing, without interruption, of a 16 mm. print of the film at Deerfield Beach, Florida, in a sixty-seat theatre during part of February, 1970. Deerfield Beach is not within either the Middle District or the Fourth Judicial Circuit. This isolated run does not overcome the extensive chilling demonstrably attributable to the unconstitutional initial seizure and following prosecutions of the film, exhibitor, and the plaintiffs in this action. No future bookings by any theatre in the State of Florida had been made as of February 20, 1970, although one run later began, but was promptly halted by state action. *See* note 6 *infra*.

until October 3, however, it is reasonable to infer that the pronounced chilling effect of the prosecution caused a loss of numerous other booking opportunities after October. For the reason that interest in a film is a perishable commodity, irreparable damage may have occurred to plaintiff Russ Meyer's first amendment right of unfettered expression as creator and distributor of the film and to the other plaintiffs' constitutional rights as well.[5] Further, it is notable that most of these cancellations were precipitated by the initial unconstitutional seizure in the criminal prosecution before the state attempted, on October 9, 1969, to proceed in a civil action by conducting a prior adversary hearing.[6]

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[5] Plaintiff Russ Meyer asserts his own first amendment right of expression as director and producer of "Vixen," the first amendment right of the public to receive protected speech (*see Stanley v. Georgia*, 394 U.S. 557, 564 (1969)), and his rights to due process under the fifth and fourteenth amendments (both the prior adversary hearing contention and the no legitimate interest claim). Plaintiff Jack Vaughan asserts the first amendment rights of himself as distributor and of the public as recipient of protected expression, and his rights to due process. The two plaintiff corporations, Eve Productions, Inc., and Jack Vaughan Productions, Inc., may be unable to assert first amendment rights themselves, *Hague v. C.I.O.*, 307 U.S. 496, 514 (1939), but they can perhaps assert the first amendment rights of the public to receive protected expression, and without question can assert the due process contentions asserted by Meyer and Vaughan. *See Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936); *Leslie Tobin Imports, Inc. v. Rizzo*, 305 F. Supp. 1135 (E.D. Pa., 1969).

[6] After the hearing on January 17, 1970, plaintiffs on March 11 moved the Court for an order to show cause, to add a party defendant, and to modify the temporary restraining order, alleging that a showing of the film in Gainesville beginning March 6 was stopped by a temporary restraining order issued March 10 in a civil action brought in the Eighth Judicial Circuit of Florida (which includes a portion of the Middle District) under section 847.011 against M & W Theatres, Inc., the exhibitor of a print of "Vixen" owned by the present plaintiffs. This order was allegedly issued without a prior adversary hearing and with attendant press publicity. It was further alleged that defendant Austin, state attorney for the Fourth Circuit, acted in concert with the state attorney for the Eighth Circuit, and in violation of this Court's temporary restraining order of November 17, 1969, in the present case. The hearing scheduled for March 13 was cancelled at the request of the present plaintiffs, presumably because an agreement was reached between the parties pending the release of this opinion.

Conclusions of Law

Plaintiffs claim that defendants, acting under color of the Florida obscenity statute, have severely chilled the exercise of their first amendment rights by impairing the distribution and exhibition of "Vixen" within the Fourth Judicial Circuit and elsewhere in Florida, *see, e.g.*, Note, *The Chilling Effect in Constitutional Law*, 69 Colum. L. Rev. 808 (1969), and, furthermore, make five specific challenges to the Florida statute[7]: (1) the Florida statute is unconstitutional because it authorizes seizure of matter conceived by the state to be obscene before a prior, judicially supervised, adversary proceeding is held on the question of obscenity; (2) the Florida statute is unconstitutional because, as authoritatively interpreted by Florida courts, it prescribes an inappropriate local standard for the identification of obscenity; (3) the Florida statute is unconstitutional because neither it nor any other Florida statute, rule or practice, assures a prompt final judicial determination of "obscenity" on appeal; (4) the Florida statute is unconstitutional because it is overbroad in that it does not contain the requirement that material be without redeeming social value; and (5) the State of Florida

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[7] On February 13, 1970, an order was issued to show cause why this Court should not wait until the Supreme Court decided *Batchelor v. Stein*, No. 565, 38 U.S.L.W. 3210 (U.S., Dec. 8, 1969) (prob. juris. noted), *appeal from* 300 F. Supp. 602 (N.D. Tex., 1969) (3 judge court). Except for the fourth contention, these challenges are distinct from those in *Batchelor*, and the order to show cause is accordingly discharged.

has no legitimate interest in the suppression of allegedly obscene movies, shown exclusively to adults who, though not pandered to, are first informed of the content.[8]

This Court finds the Florida obscenity statute, section 847.011, unconstitutional in its entirety for the first three contentions made by plaintiffs; the fourth claim we find to be not an unconstitutional defect, but one which it is desirable to correct if a subsequent statute should be enacted; and the Court finds it unnecessary, in light of the ruling made here, to consider plaintiffs' fifth contention at this time.

STANDING

Defendant have suggested in their trial brief, p. 16, that plaintiffs cannot claim a full measure of first amendment protection because their interests are diminished by being primarily commercial and private, instead of being personal and public, citing *Carter v. Gautier*, 305 F. Supp. 1098 (M. D. Ga., 1969) (*denying an injunction of a pending* state criminal

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[8] These contentions are different from several that have been raised recently in other cases. The issues in the present case do not include the privacy rationale of the three-judge panel in *Byrne v. Karalexis*, No. 1149, 38 U.S.L.W. 3369 (U.S., Mar. 23, 1970) (prob. juris. noted), *appeal from Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass., 1970); and the "right to read necessarily protects the right to receive" decision of *United States v. Thirty-Seven Photographs*, 309 F. Supp. 36 (C.D. Cal.) *appeal filed*, No. 1475, 38 U.S.L.W. 3433 (U.S., Apr. 24, 1970); *United States v. Lethe*, 7 Crim. L. Rptr. 2144 (E.D. Cal., Apr. 29, 1970). Neither is it at issue here whether criminal mens rea can be present for distribution or exhibition occurring before a prior adversary hearing determines probable cause that a film or book is obscene, or whether, in the alternative, one who sells or exhibits must do so at his own risk. In addition, this Court has not been presented with an attack specifically on section 847.011(1)(b), although it is somewhat similar to section 847.06(2), stricken as unconstitutional in *Morrison v. Wilson*, 307 F. Supp. 196 (N.D. Fla., 1969) (3 judge court); *See Stanley v. Georgia*, 394 U.S. 557 (1969) (private possession of obscene matter constitutionally protected).

prosecution as opposed to the relief sought here, declaratory judgment). This suggestion is inapplicable to plaintiff Meyer who asserts personal first amendment rights as the creator of "Vixen." As to the other plaintiffs, it is also without merit. The Fifth Circuit Court of Appeals stated persuasively, in *Machesky v. Bizzell*, 414 F.2d 283 (5th Cir., 1969):

> . . . . First Amendment rights are not private rights of the appellants so much as they are rights of the general public. "Those guarantees [of speech and press] are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open socieity." [citations omitted and emphasis added]. Id. at 289; Recent Decisions, 4 Ga. L. Rev. 610, 616-17 (1970).

The basis for the decision in *Carter v. Gautier, supra*, was that sufficient irreparable injury had not been shown to support injunctive relief against state prosecution where "private" first amendment rights were suppressed. *Sheridan v. Garrison*, 415 F.2d 699 (5th Cir., 1969), *cert. denied*, 396 U.S. 1040 (1970), held that, where freedom of expression is threatened or suppressed, any chilling of that expression constitutes irreparable injury per se sufficient to sustain injunctive relief against a statute challenged as being unconstitutional on its face affecting free speech in a *pending* state criminal prosecution affecting expression. *Id.*, at 705-709. As noted in *City News Center, Inc. v. Carson*, 310 F. Supp. 1018, 1023 (M. D. Fla., 1970):

> [C]ommercial parties are inextricably involved in the production and distribution of much of the information now exchanged in our society, whether by television, radio, books, or newspapers. To deny

> these media standing to assert the public's interest in the free exchange of ideas and information, simply because they have a monetary interst, would be contrary to the fundamental purposes of the first amendment.

See United States v. Alexander, 38 U.S.L.W. 2679 (8th Cir., filed May 22, 1970). In the present case, no injunctive relief is sought involving a pending state proceeding, but only a declaratory judgment with injunctive relief from future prosecutions. We hold that plaintiffs' standing to bring this action is not diminished by their commercial interest in the film.

1. Provision for Ex Parte Injunction

Florida Statutes, Section 847.011 (7) (b) (1967), provides for the issuance of an ex parte injunction, without notice, of a threatened violation of the obscenity statute:

> (7)(b) After the filing of such a complaint, the judge to whom it is presented may grant an order restraining the person complained of until final hearing or further order of the court. [The statute further provides that "whenever" a hearing is s requested, it shall be held promptly and after due notice] . . . provided, however, that such notice shall be dispensed with when it is manifest to such judge, from the sworn allegations of the complaint or the affidavit of the plaintiff or other competent person, that the apprehended violation will be committed if an immediate remedy is not afforded.

In the present case, defendants used this ex-parte procedure initially, thereby giving plaintiffs standing to complain of the provision's unconstitutionality. Florida courts

have sanctioned the use of this subsection, *e.g., South Florida Arts Theaters, Inc. v. Florida ex rel. Mounts*, 224 So. 2d 706 (Fla. 4th D.C.A., 1969), *cert. denied*, 229 So. 2d 871 (Fla., 1969). In the pre-trial stipulation and in defendants' trial briefs, defendants expressly concede that this provision for an ex parte injunction is unconstitutional, and we so hold.[9] *E.g., A Quanity of Books v. Kansas*, 378 U. S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir., 1969) (film), *cert. denied*, 38 U.S.L.W. 3222 (U. S., Dec. 15, 1969); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir., 1968) (film); *City News Center v. Carson*, 310 F. Supp. 1018 (M. D. Fla., 1970); *Mandell v. Carson*, 309 F. Supp. 326 (M. D. Fla., 1969) (the first order in the present case). It must be noted that a prior adversary hearing to determine whether probable cause exists for arrest or seizure is constitutionally required not to make prosecutions of obscenity difficult for the state, but rather to guard against over-zealous prosecution of *protected* expression. This panel, in a case heard the same day as the present one, rejected any distinction between a mass seizure of books and the seizure of a single print of a film. *Carroll v. City of Orlando*, _____F. Sup._____ (M. D. Fla., 1970) [No. 69-255-Orl-Civ, filed Feb. 18, 1970] (3 judge court) (Young, J. dissented), (appeal was taken to U.S. Sup. Ct., but was withdrawn Apr. 27, 1970); *see, e.g., Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir., 1969), *cert. denied*, 38 U.S.L.W. 3320 (U.S., Feb. 24, 1970); *Vergari v. 208 Cinema, Inc.*, 38 U.S.L.W. 3338 (U.S., Feb. 27, 1970) *(cert. denied)*. The extensive chilling caused by the seizure of a print of a film is substantiated by the facts in this case

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[9] Although this one subsection might be severed from the remainder of the statute, *see Morrison v. Wilson*, 307 F. Supp. 196, 199 (N.D. Fla., 1969) (3 judge court); *State v. Reese*, 222 So. 2d 732 (Fla., 1969), the other contentions discussed below require holding the entire statute invalid.

where there were only six prints of the film in 1969 in the entire state.[10]

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[10] The amicus curiae brief, adopting a position abandoned by defendants, strongly urges that a prior adversary hearing is not required before the state may proceed against speech or expression by seizure or arrest, and it relies upon the Supreme Court affirmance of *Milky Way Productions, Inc. v. Leary*, 305 F. Supp. 288 (S.D. N.Y., 1969), *aff'd per curiam*, 397 U.S. 98 (1970). We view that case, despite its choice not to require a prior adversary hearing, as having been affirmed primarily because of plaintiffs' failure to seek federal injunctive relief until "a summer and beyond" had passed after the chilling of expression began, and because plaintiffs "acquiesced [from] May and June [until mid-August] in the postponement of the pending state criminal proceedings." *Id.* at 291; *cf.*, two-month delay before requesting declaratory relief in *Holden v. Arnebergh*, _____ Cal. App. 2d _____, 71 Cal. Rptr. 401 (Cal., 1968), *appeal dismissed*, 394 U.S. 102 (1969). Whatever delay has been caused in the present case has not been attributable to plaintiffs, who acted promptly and repeatedly urged a speedy conclusion to the case. Since the affirmance of *Milky Way*, the Supreme Court has affirmed, per curiam, *Gable v. Jenkins*, 38 U.S.L.W. 3405 (U.S., Apr. 20, 1970), *appeal from* 309 F. Supp. 998 (N.D. Ga., 1969), a decision that unequivocally requires a prior adversary hearing before seizure. In any event, *Milky Way* deals only with an arrest, and not a seizure as in the present case.

A panel of the Fifth Circuit Court of Appeals recently stated in a federal prosecution (involving a seizure of eleven books and one deck of playing cards) that the affirmance of *Milky Way* "confirms" that a prior adversary hearing is unnecessary. *United States v. Fragus*, _____ F.2d _____ [No. 27801, filed June 23, 1970], *supplementing*, 422 F.2d 1244 (5th Cir., 1970) (per curiam). The result and reasoning in that decision is tenable only as it holds that Fragus waived all non-jurisdictional defects by his knowing and intelligent guilty plea. Accordingly, the comments in *Fragus* about *Milky Way*, *Stanley v. Georgia*, *supra*, the constitutionality of 18 U.S.C. §1462, the lack of a prior adversary hearing before arrest or seizure, and *United States v. 37 Photographs*, supra, are not essential to the issues raised in that case.

In addition, the amicus brief attempts to undercut the validity of *Redrup v. New York*, 386 U.S. 767 (1967), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), on the basis of the state court decision in *Cain v. Commonwealth*, 437 S.W. 2d 769 (Ky. Ct. App., 1969); that case was reversed by the United States Supreme Court after the amicus brief was filed. *Cain v. Kentucky*, 397 U.S. 319 (1970) (per curiam).

2. Improper Interpretation of "Contemporary Community Standards"

Four years after the decision in *Roth v. United States*, 354 U.S. 476 (1957), the Florida Legislature adopted the *Roth* test in subsection 10 of the statute under attack here:

> (10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

As subsequently interpreted in *Jacobellis v. Ohio*, 378 U.S. 184, 192-95 (1964), and as *stipulated* by defendants to be the controlling interpretation,[11] the phrase "contemporary community standards" means a national standard of contemporary values. A national standard has been followed

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[11] Defendants stipulated that *Jacobellis, supra*, dictates a national standard, but deny that the Florida courts have authoritatively ruled otherwise. The amicus brief asserts that six federal Courts of Appeals and four states have followed a national standard, that three states have adopted a statewide standard, that five states, including Florida, have retained a local community standard, and that four states are confused in what standard controls. The amicus brief relies, for support of its contention that the lack of a national standard does not present a federal question, on the recent denial of certiorari of two cases, both involving nightclub performances. *California v. Giannini*, 23 L. Ed. 2d 223 (1969); *Jones v. City of Birmingham*, 38 U.S.L.W. 3254 (U.S., Jan. 12, 1970). Even if the facts were similar to those in the case at bar, such denials do not imply a ruling on the merits. *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). The Court's opinion in *Jacobellis* should have put to rest the contentions of the amicus brief:

> The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines," . . . ; we see even less justification for allowing such limits to vary with town or county lines. (Citation omitted) *Id.* at 194–95.

by state courts outside of Florida in post-*Jacobellis* cases, *e.g.*, *State v. Locks*, 97 Ariz. 148, 397 P.2d 949 (1964); *State v. Vollmar*, 389 S.W. 2d 20 (Mo., 1965). In two cases a local standard was used and they were reversed, for that or other reasons, by the United States Supreme Court: *Gent v. State*, 239 Ark. 474, 393 S.W.2d 219 (1965), (applying standards of Pine Bluff, Ark.), *rev'd sub nom. Redrup v. New York*, 386 U.S. 767 (1967); *State v. Henry*, 250 La. 682, 198 So. 2d 889, 895 (1967) (applying standards of the Parish of Iberia), *rev'd per curiam*, 392 U.S. 655 (1968).

The Florida courts, however, contrary to the national standard established in *Jacobeelis*, have authoritatively construed the *Roth* "community" to be a local or countywide area, and federal courts must accept the state view of a state statute. *Kingley International Picutres Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684 (1959).

In pre-*Jacobellis* cases, the Third District Court of Appeals approved a holding htat "contemporary community standards" meant the "standards in Dade County." *Gerstein v. Pleasure Was My Business*, 136 So. 2d 8, 9 (Fla. 3d D.C.A., 1962), and affirmed a decree applying such standards, *Tralins v. Gerstein*, 151 So. 2d 19 (Fla. 3d D.C.A., 1963). The latter case was reversed, per curiam, by the United States Supreme Court. *Tralins v. Gerstein*, 378 U.S. 576 (1964).

After *Jacobellis*, the Florida courts continued to construe the statute to mean only local standards. In *Felton v. City of Pensacola*, 200 So. 2d 842, 848 (Fla. 1st D.C.A., 1967), the court held that the standards were those of the City of Pensacola:

> [T]he test of obscenity recognized in the Roth case, supra, is whether "to the average person, applying contemporary community standards" the dominant theme of the material taken as a whole appeals to prurient interest. *Certainly the judge of the Municipal Court of the City of Pensacola is in a much better position than the members of this court to know the "contemporary community standards" prevailing in the said city, where the alleged offenses took place.* *Id.* at 848 (emphasis added).[12]

The Supreme Court of Florida denied certiorari, *Felton v. City of Pensacola,* 204 So. 2d 210 (Fla., 1967), and the United States Supreme Court reversed, per curiam, on March 11, 1968. *Felton v. City of Pensacola,* 390 U.S. 340 (1968).

That reversal *non obstante,* and despite the issue being squarely presented to him, *see* Brief of Appellants, filed July 5, 1967, pp. 12-13, (Exhibit 11, in evidence), the same judge, on July 11, 1968, held that "contemporary community standards" were the standards of Escambia County (which includes the City of Pensacola):

> The judge of the Court of Record was, under our law, the trier of facts, and we have no authority to substitute our judgment for his on questions of fact, even if we wished to. Observation of this rule is particularly important here, because *the test of obscenity depends upon community standards, and*

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[12] This statement demonstrates the difficulty of review where the standards are not articulated or proven. It is contended in *Batchelor v. Stein,* No. 565, 38 U.S.L.W. 3205 (Dec. 9, 1969) (prob. juris. noted), that the standards of "redeeming social value" must be pleaded and affirmatively proven by the prosecution. Here we consider only whether the standard is local or national, not whether it must be pleaded and proven by the state.

> *the judge and other citizens of the community are better equipped to know those standards than appellate judges living far away.*
>
> Along with the judge, 18 citizens of Escambia County saw the film and testified as to their reactions to it. *Nissinoff v. Harper,* 212 So. 2d 666, 668 (Fla. 1st D.C.A., July 11, 1968).

The Supreme Court of Florida denied certiorari, *Nissinoff v. Harper,* 221 So.2d 747 (Fla., 1968), and no appeal was taken, for in the fifteen months between the trial decree and the appellate decision the theatre burned down, making the case moot. Affidavit of Alan H. Rosenbloum, Exhibit 12.

The constitutional necessity for a national, as opposed to a local, standard is apparent not only because "[i]t is, after all, a national constitution we are expounding." *Jacobellis v. Ohio, supra,* at 195, but also because of the unevenness of censorship permitted by a local standard, making criminal to show in one part of the state, or of the nation, that which is legal in another (an equal protection rationale), and because of the inevitable consequence of chilling the dissemination of protected expression (a first amendment basis). Moreover, this national standard is not a national "average" of permissibility that would result in half of the nation being brought under the more repressive standards of the other half, thereby depriving that public of access to expression permitted in their own locale. Although the contours of the national standard may be imprecise, the first amendment guarantee is a fundamental one that protects interstate (and intrastate) expression from the vagaries of local censorship and political opportunism.

Since the statute has been interpretated in a manner contrary to the Supreme Court's ruling in *Jacobellis,* and the

state has persisted in that interpretation, we do not find evidence of sufficient willingness by the state courts to change their view so as to be in accord with *Jacobellis*, and therefore we decline to abstain from holding the statute unconstitutional. Moreover, a contrary ruling by this Court to the position the Florida courts have taken would not necessarily be followed by them.[13]

3. Failure of the State to Provide for Prompt Appellate Consideration

Although section 847.011(7)(b), (c), provides for an expedited trial procedure to minimize incursions on the right of protected expression, the statute makes no provision whatever for an expedited appellate consideration by the District Courts of Appeal, the courts of final jurisdiction in most cases. Because no prompt review is specified by law, an unwarranted delay can occur before a final decision is reached, and during that delay the evanescent right of freedom of expression may be lost.

The appeal procedure is vitally related to freedom of speech, for in Florida either party in a civil censorship proceeding may appeal. The state has recently taken such appeals from lower court rulings. *E.G., State ex rel. Hallowes v. Reeves*, 224 So. 2d 285 (Fla., 1969); *State v. Reese*, 222

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[13] For example, the First District Court of Appeal recently upheld the Jacksonville vagrancy ordinance despite a three-judge district court's decision striking the substantially similar Florida vagrancy statute as unconstitutional. *Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla., 1969) (3 judge court), *appeal taken*, No. 630, 38 U.S.L.W. 3225. The Florida court stated: "A decision of a Federal District Court, while persuasive if well reasoned, is not by any means binding on the courts of a state." *Brown v. City of Jacksonville*, No. M-488 (Fla. 1st D.C.A., filed June 9, 1970).

So. 2d 732 (Fla., 1969) (reinstating two criminal informations which had been dismissed by the trial judge on the grounds that section 847.011 failed to prescribe a sufficiently ascertainable standard of guilt). An adverse ruling by the trial court may mean that speech will be chilled until it is vindicated on appeal. On the other hand, the citizen whose expression is found to be protected by the circuit court may nonetheless be chilled by the unresolved prosecution for whatever period the state's appeal consumes. Florida Appellate Rule 5.12 provides that no supersedeas bond is required of the state unless required by court order. Thus, an initial civil finding that the material is not obscene does not protect further expression during an appeal taken by the state. For instance, in this case, the chilling effect was demonstrated in exhibitor Mandell's testimony that he would not risk showing the film until after a successful appeal, regardless of whether he won or lost at the trial level.[14]

In the recent past, appeals from trial decision in Florida obscenity cases have consumed inordinate lengths of time. Docket sheets in evidence trace the slow progress of two decisions by the First District Court of Appeal: *Felton v. City of Pensacola,* 200 So. 2d 842 (Fla. 1st D.C.A., 1967), *cert. denied,* 204 So. 2d 210 (Fla., 1967), *rev'd per curiam,* 390 U.S. 340 (1968); *Nissinoff v. Harper,* 212 So. 2d 666 (Fla. 1st D.C.A., 1968), *Cert. denied,* 221 So. 2d 747 (Fla., 1968) (right of petition to United STates Supreme Court mooted by theatre fire during appeal).

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[14] "Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality." *Freedman v. Maryland,* 380 U.S. 51 (1965).

In *Felton*, after the trial court entered its judgment on February 28, 1966, the District Court of Appeal docketed the appeal for oral argument two months and two days after appellants' briefs were submitted. It rendered its decision eight months and four days after oral argument. The appellate decision, on July 6, 1967, came more than one year and four months after the trial court entered its judgment.

In *Nissinoff*, the trial court entered its judgment on March 14, 1967, the arguments before the District Court of Appeal were set only after two months and six days had elapsed after all briefs were submitted, and the court rendered its decision on July 11, 1968, more than one year and three months after the trial court entered its judgment, and it denied rehearing on August 14,1968. The theatre burned down before a petition for writ of certiorari could be made to the United States Supreme Court.

The unnecessary and unconstitutional chilling effect of this delay in the appeals is apparent from the *Felton* and *Nissinoff* cases, both begun and decided after the United States Supreme Court had established that any censorship process must provide for a "prompt final judicial decision." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). In *Freedman*, it was stated:

> Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and *final vindication of the film on appellate review, six months. Id.*, at 55 (emphasis added and citation omitted).

The State of Maryland subsequently amended its statute to require advanced hearings on appeal. In a case brought in Maryland after amendment, the final judicial determination, including appellate review, came in less than three months. *Trans-Lux Distr. Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965). After a Dallas ordinance was similarly invalidated for failure to provide for a speedy review, *Interstate Circuit, Inc. v. City of Dallas*, 247 F. Supp. 906 (N. D. Tex., 1965), the ordinance was amended to require the censorship board to waive all statutory notice of appeal and times for appeal, to file its brief in ten days, and to request advanced consideration by the appeals court. A subsequent appellate decision was reached in less than two months, on April 5, 1966, after the case had been initially filed on February 14, 1966. *Interstate Circuit, Inc. v. City of Dallas*, 402 S.W. 770 (Tex. Civ. App., 1967), *rev'd on other grounds*, 390 U.S. 676 (1968). Apart from the ordinance's concern only with viewing by juveniles under sixteen years of age, the shortness of the appellate proceeding in that case accounts for the Supreme Court's language which seems to indicate that a speedy trial is all that is constitutionally required. *Id.*, at 690 n. 22. That footnote itself refers to the Supreme Court's decision in *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141-42 (1968), which quoted *Freedman, supra*, at 58-59, with emphasis: "[T]he procedure must also assure a

prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (emphasis by the Supreme Court).[15]

In deference to the wide choice of acceptable procedures that the Legislature might devise to protect the right of free expression while an appeal is being taken, we decline to prescribe what specific procedures must be used.

4. Failure of the Statute to Include a Statement of the Memoir Test

It was asserted in the complaint and argued in post-hearing memoranda that the Florida statute is constitutionally defective because, on its face, it is overbroad for failure to include the additional *Memoirs v. Massachusetts,* 383 U.S. 413 (1966), requirement for obscenity that the material be without socially redeeming value. Plaintiffs also

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[15] The defendants contend that the state statute cannot be held defective for failure to provide for a speedy appeal because the federal customs statute, 19 U.S.C. §1305, does not provide for a speedy appeal. *See United States v. One Carton Positive Motion Picture Film Entitled "491"*, 367 F.2d 889, 898–904 (1966). A review of such cases reveals that in some of them imported material was released pending review, *United States v. One Book Entitled "The Adventures of Father Silas"*, 249 F. Supp. 911 (S.D. N.Y., 1966), or in others the importers caused the delay, *e.g., United States v. A Motion Picture Entitled "Pattern of Evil"*, 304 F. Supp. 197 (S.D. N.Y., 1969); *United States v. A Motion Picture Entitled "I Am Curious-Yellow"*, 285 F. Supp. 465, 469 (S.D. N.Y., 1968), *rev'd* 404 F.2d 196 (2d Cir., 1968). In the customs cases, federal courts are given the latitude to construe and apply the statute in obedience to the dictates of *Freedman v. Maryland, supra. See United States v. A Motion Picture Entitled "Pattern of Evil", supra,* at 200; *United States v. 392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485 (D. Md., 1966), *aff'd,* 373 F.2d 633 (4th Cir., 1967), *rev'd sub nom. Central Magazine Sales v. United States,* 389 U.S. 50 (1967), but federal courts cannot save a state statute by a similar construction where the evidence conclusively demonstrates that the state courts have chosen not to comply with *Freedman.*

contend, with some force, that the recent decision of the Florida Supreme Court, upholding section 847.011, in *State v. Reese*, 222 So. 2d 732 (Fla., 1966), does not guarantee that the *Memoirs* modification of *Roth* will be read into the statute as the "majority" opinion in *Reese* purports to do. The *Reese* court's opinion was concurred in by all six members of the court, but three of them specially concurred, stating that, in their opinion, the post-*Roth* pronouncements by the United States Supreme Court (and particularly the *Memoirs* addition) provided no clear modification of *Roth*, and possessed "no dignity as . . judicial precedent." Furthermore, they stated that the "redeeming social value" test was merely so much "hocus-pocus. *[sic]*" *Id.*, at 738. Although if this attitude were to prevail there would be little assurance that constitutionally guaranteed expression would be protected, we will accept the "majority" opinion of the court and presume that the Florida courts would have interpreted the Florida obscenity law in light of the *Memoirs* standards. A similar confidence in the Florida courts was stated by *Morrison v. Wilson*, 307 F. Supp. 196 (N.D. Fla., 1969) (3 judge court), in its construction of a companion obscenity statute, section 847.06. If a revised statute is enacted, the addition of the *Memoirs* test is but one of several modifications that should be made so that adequate notice is given in the statute of the standards to be applied. *See The Great Speckled Bird v. Stynchcombe*, 298 F. Supp. 1291 (N. D. Ga., 1969).

5. The State of Florida Has No Interest in Preventing Forwarned Adults, Absent Pandering, from Deciding for Themselves What Films They Wish to See.

Plaintiffs assert that the State of Florida has no interest in preventing adults, who are forewarned of the film's contents, absent pandering, from choosing what they may see, citing *Stanley v. Georgia*, 394 U.S. 557 (1969); *Karalexis v. Byrne*, 306 F. Supp. 1363 (D. Mass., 1970), *prob. juris. noted, Byrne v. Karalexis*, No.1149, 38 U.S.L.W. 3369 (U.S., Mar. 23, 1970); *see Roth v. United States*, 354 U.S. 476, 510-11 (1957) (Douglas, J. dissenting). Considerable commentary has recently been evoked by this position. Engdahl,*Requiem for Roth: Obscenity Doctrine is Changing*, 68 Mich. L. Rev. 185 (1969); Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 Column L. Rev. 391 (1963); Morreale, *Obscenity: An Analysis and Statutory Proposal*, 1969 Wis. L. Rev. 421; *The Supreme Court*, 1968 Term, 83 Harv. L. Rev. 7, 147-54 (1969); Note, *Obscenity and the Law: An Appraisal of the Contemporary Concept of Obscenity*, 1 Seton Hall L. Rev. 99 (1970); Comment, Stanley v. Georgia: *New Directions in Obscenity Regulation*, 48 Tex. L. Rev. 646 (1970); *see* Katz, *Free Discussion v. Final Decision: Moral and Artistic Controversy and the* Tropic of Cancer *Trials*, 79 Yale L.J. 209 (1969); Krislov, *From Ginzberg to Ginsberg: The Unhurried Children's Hour In*

Obscenity Litigation, 1968 Sup. Ct. Rev. 153. In light of the ruling that is made here, it is unnecessary to reach this contention at this time.[16]

Not reached by this ruling is Florida Statutes, section 847.012 (1967), prohibiting sale or distribution of obscenity to persons under eighteen years of age. *See Ginsberg v. New York*, 390 U.S. 629 (1968). Nor does this decision reach the question of the alleged obscenity of the film which, for the reasons underlying this decision, the Court has found it unnecessary to witness; and the transcript with pictures of the film is therefore irrelevant and it ordered stricken from the amicus brief and returned to Citizens for Decent Literature, Inc.

This Court is keenly mindful that pornographic films and publications, often devoid of redeeming social or literary value, are being distributed throughout this state and nation. This problem should perhaps receive study and appropriate constitutional action by Congress and the legislatures.

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[16] Plaintiffs seem, in essence, to argue that no rational basis has been shown for the state to exclude any expression from forewarned adults in the absence of pandering. *See* Henkin, *Morals and the Constitution: The Sin of Obscenity*, *supra*. This due process contention (fourteenth amendment) differs in origin from the privacy rationale of *Karalexis v. Byrne*, or *Stanley*, *supra* (grounded in the first, fourth, and perhaps ninth amendments, and applied to the states through the fourteenth amendment's due process clause). Recent decisions in other areas may lend collateral support to the privacy argument. *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex., 1970) (consensual sodomy protected under first amendment); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis., 1970) (3 judge court) (holding unconstitutional state abortion statute as invasion of woman's privacy); *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

A separate order consistent with the above will be entered simultaneously with this opinion, remitting the remaining questions of fact and damages not considered here to the requesting judge.

Judge Young dissents by separate opinion.

DONE AND ENTERED this 22nd day of July 1970.

/s/ Bryan Simpson
Circuit Judge

/s/ Wm. A. McRae, Jr.,
District Judge

/s/ George C. Young,
District Judge